Nos. 14483-84

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS,
Plaintiff and Appellants,

vs.

SOUTHERN PACIFIC CO. (Pacific Lines),
Defendant and Appellee,

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Intervenor and Appellee.

PHILIP F. JENSEN,
Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD CO., a corporation,
Defendant and Appellee,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction and Order Granting Summary Judgment and Dismissal.

APPELLANTS' REPLY BRIEF.

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Statement.

Appellees have recast and reduced Appellants' statement of questions involved from seven to two. Actually, the statement of questions involved can be reduced to one question containing several subsidiary questions. The ultimate question to be determined by this court is whether or not Appellants' claim of unconstitutionality as alleged in the complaint presents a substantial federal question

which requires a hearing and determination by a three-judge court. The principal subsidiary question to be determined by this court is whether or not "government action" is involved so as to require decision as to whether or not constitutional rights of Appellants have been violated. Assuming that "government action" is found to exist in this case, the constitutional rights which Appellants assert have been violated are based on the First, Fifth and Thirteenth Amendments of the United States Constitution and constitute a denial of freedom of assembly, petition, speech and religion, a denial of liberty and property without due process of law and a violation of the proscription against involuntary servitude. Appellants also contend that the union shop statute, which is the subject of this litigation, was not enacted pursuant to the Constitutional power to regulate interstate commerce.

I.

The Union Shop Statute Does Not Simply Repeal Portions of the Railway Labor Act as Contended by Appellees.

Appellees' sole defense to the contention of Appellants that the union shop statute is unconstitutional is based on the case of *Otten v. Baltimore & Ohio R. Co.,* 205 F. 2d 58, and the argument that Section 2, Eleventh of the Railway Labor Act is a mere repeal of a previous statutory prohibition and as such cannot be unconstitutional. (Appellees' Br. pp. 10, 11.) Appellees recognize that, according to Judge Hand in the *Otten* case, the union shop statute may be deemed to have affirmatively legalized union shop agreements if they were invalid and at common law and that under such circumstances a challenge to the constitutionality of the 1951 Amendment might be

"substantial." Judge Hand reasoned, however, that since union shop agreements were valid under the common law of New York, there could not be any affirmative legalizing of union shop agreements. Appellees assert that there is no prohibition of common law in California of union shop agreements; hence, the union shop statute cannot affirmatively legalize union shop agreements in California.

On its face, the statute goes far beyond a *pro tanto* repeal of paragraphs fourth and fifth of the Railway Labor Act. First, it expressly provides that a union shop shall be permitted, and thereby affirmatively legalizes the arrangement; second, it supersedes any conflicting provision of the Railway Labor Act and not merely paragraph fourth and fifth of Section 2; third, it supersedes any other statute of the United States, such as the Norris-LaGuardia Act, which contains the declaration of policy that an employee "should be free to decline to associate with his fellows" (29 U. S. C., Sec. 102); fourth, it supersedes conflicting court decisions of the United States; fifth, it supersedes present and prospective state statutes such as "right to work" laws found in some eighteen states; sixth, it supersedes conflicting state rules of common law.

Other parts of the statute also contradict the idea of a mere repeal. Paragraph (a) of Section 2 Eleventh sets forth in detail the type of union shop agreement that can be entered into. Subparagraph (c) makes further provisions along the same line and sets forth how the requirement of union membership may be satisfied. These provisions are regulatory and affirmative new legislature prescribing rules for the future as well as the present. Thus, the statute is *"permissive"* in declaring that a union shop agreement shall be permitted. What is expressly

permitted by law is affirmatively authorized, sanctioned and legalized. The statute is *regulatory;* it spells out what shall constitute a valid union shop agreement and defines its force and effect. The statute is also *mandatory.* It expressly strikes down every conflicting law, state and federal.

The foregoing demonstrates the error of the *Otten* case, which is the sole case relied on by Appellees, which held that the union shop statute is equivalent only to a repeal *pro tanto* of Subsection Fifth. The difficulty with the *Otten* case is that the decision was based upon the validity of the union shop under the law of New York, where the controversy arose. But some eighteen states have right-to-work statutes, and, if the union shop statute does no more than to repeal the previous ban on the union shop in the Railway Labor Act, then a union shop is admittedly, unlawful in at least eighteen states. That would bring into application Judge Hand's statement that substantial Constitutional questions might arise if the statute affirmatively legalized union shop agreements. Conceivably, if Judge Hand's decision is correct, we could have the unique and probably unprecedented situation of an Act of Congress which is constitutional in twenty-two states and unconstitutional in eighteen states.

The *Otten* case came up on demurrer and the only question that was decided by Judge Hand was that any claim that the statute was unconstitutional *because it repealed a prior statutory provision was insubstantial.* Since Appellants' argument is not simply that the statute is unlawful because it repeals a prior prohibition, the language of the *Otten* case is inapplicable to the instant case. Judge Hand did not consider the statute in the context of the entire Railway Labor Act, nor did he have before

him for consideration the fact that some eighteen states have right-to-work laws which were swept aside, as well as thousands of contracts made pursuant to these right-to-work laws. In sum, Congress took affirmative action in legalizing the union shop in at least eighteen states and barred the remaining twenty-two, including the State of California, from enacting such legislation in the future.

Appellants wish to make it plain that they do not argue that the union shop statute is unconstitutional because it repealed in part prior prohibitions. Appellants' complaint is that the statute deprives them not of rights secured by statute, but of Constitutional rights. Appellants contend that Congress cannot authorize employers and unions in concert to violate constitutional freedoms of employees. This issue cannot be avoided by the evasive argument based on the *Otten* case that Congress only repealed a previous statutory prohibition.

II.

The Issue Before the Court Is Whether the Union Shop Statute and Other Governmental Action Aid Private Parties in Some Way to Bring About the Union Shop.

Appellees assert that Appellants rely solely upon the theory that the unions are exercising delegated legislative authority when they contract with the railroads for a union shop. This is not a correct statement of our position nor of the applicable rule of law for determining the existence of "government action." Appellants' point is that the action of private parties is subject to test under the federal Constitution whenever it is "in some way" aided by the Government or, as the Supreme Court of the United States has expressed it, "where the thumb of gov-

ernment is on the scales" in their favor. (*Civil Rights Cases,* 109 U. S. 3, 11, 17; *American Communications Assn. v. Douds,* 339 U. S. 382, 401; *Public Utilities Comm. v. Pollak,* 343 U. S. 451, 462; *Shelley v. Kraemer,* 334 U. S. 1, 14; *Barrows v. Jackson,* 346 U. S. 349, 358.)

Appellees frame their contention as if the rule were either that the action complained of must be taken by an agency of government or in some way directly brought about by government. They cite no authority for this proposition.

Three distinct types of government assistance exist in this case:

(1) Legislative action in the form of, (a) the passage by Congress of the Union Shop Statute, (b) the intent of Congress as shown by the legislative history of the Statute to establish compulsory union membership in the railroad industry, and (c) making the Union Shop Statute an integral part of the Railway Labor Act which confers power on the unions to enforce such demands.

(2) Executive action by (a) the intervention of the National Mediation Board, (b) the direct intervention by President Truman in his appointment of Emergency Board No. 98, and (c) the Report of this Board finding that Congress had established a public policy in favor of a union shop on the railroads and recommending that the arrangement be put into effect.

(3) By the action of Respondent unions in their capacity as statutory bargaining agents under the Railway Labor Act demanding and obtaining a union shop in conformity with the Act under threat of strike sanctions.

Each of these forms of aid is alone sufficient to require judicial consideration of the Constitutional issues raised here. But for each of these governmental steps the union shop would have been impossible of achievement. This is undoubtedly sufficient under the rule laid down in *Shelley v. Kraemer,* 334 U. S. 1, 19.

Appellants would like to bring to the court's attention additional cases for the proposition that where governmental action aids private parties in some way, Constitutional questions arise. *Public Utilities Comm v. Pollak,* 343 U. S. 451, involved a private company which had instituted a program of receipt of radio broadcasts on its busses and trolleys without prior permission from any public agencies. Riders complained to the Public Utilities Commission and it held a hearing and declared that the practice was not adverse to public interest and permitted it to be continued. The riders went to court contending that their rights to privacy under the First and Fifth Amendments were being abridged. The Supreme Court found the requisite "government action" even though the company was not a governmental agency and it had not been ordered by any agency to receive radio broadcasts. *Permissive* action of the Commission was regarded as sufficient to raise a Constitutional question. (343 U. S. at 462.) So, in this case, even if the "permissive" grant by Congress was taken literally, it is "government action" sufficient to raise Constitutional issues.

Permissive authority expressly granted or otherwise allowed by a law-making body has been held by the Supreme Court to be governmental action in other cases. In *Smith v. Allwright,* 321 U. S. 649, the Supreme Court, speaking of the federal Constitution grant to all its

citizens of a right to participate in elections without restriction in any state because of race, said at page 664.

> "This grant to the people of the opportunity for choice is not be nullified by a state through casting its electoral process in a form which *permits* a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." (Emphasis added.)

In *Shelley v. Kraemer,* 334 U. S. 1, the "but for" test was applied when the court said:

> "It is clear that *but for* the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." (334 U. S. 19.) (Emphasis added.)

In the case at bar, it has already been shown that "but for" various forms of governmental action, including enactment of the union shop statute and the striking down of conflicting state laws, there could be no union shop in the railroad industry.

Railroad companies and railroad unions are quasi-governmental agencies for some purposes. Railroads and their employees, in engaging in common carriage of persons and property, are employed in a business effected with a public interest. Nearly every aspect of their affairs is a matter of public concern and subject to governmental regulation. What is sufficiently public to be subjected to such extensive regulation is likewise sufficiently beyond the category of purely private action to be subject to Constitutional limitations. Thus, governmental rather than purely private action to be subject to Constitutional

limitations. Thus, governmental rather than purely private action is involved in the conduct of a company-owned town. (*Marsh v. Alabama,* 326 U. S. 501.) The Supreme Court said:

> "In our view, the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute." (326 U. S. at 509.) (Emphasis added.)

Appellants do not contend that Appellees are "governmental entities," and we have pointed out that the test of "government action" does not require that the court find Appellees to be "governmental entities." There is "government action" sufficient to raise Constitutional questions when private action looses its purely private character and is sanctioned "in some way" by Government. (*Civil Rights Cases,* 109 U. S. 3, 11, 17.)

III.

Appellees' Reply Is Significant for Its Omissions.

Appellees submit that the outstanding feature of Appellants' brief is what it does not say. They make no effort whatsoever to controvert Appellants' analysis of the decisions and conclusions to be drawn from them under the first six points of Appellants' brief. They do not question the point that a man's right to work may not Constitutionally be subjected to unreasonable, arbitrary and capricious conditions. They do not attempt to convert the authorities cited by Appellants that there is

freedom of association under the Constitution, or tha Appellants have been denied freedom of speech and free dom of religion, or that the money to be taken from un willing union members through compulsory unionism i property protected by the Fifth Amendment. Appellee disposed of all of these arguments at page 11 of thei brief by saying that the *Otten* case is decisive of all o these points and "is a sufficient answer to the contention advanced by Appellants in the first six sections of thei argument to this court."

Appellees' admissions in these particulars cannot be in advertent. They do not dispute the authorities and argu ments referred to for they know that these authorities and arguments cannot be answered.

In conclusion, Appellants call the attention of the court to a decision of the Nebraska Supreme Court, *Hanson et al. v. Union Pacific R.R. Co.,* 160 Neb. 669, decided since the filing of Appellants' opening brief on July 6 1955. In the *Hanson* case the Supreme Court of Nebraska held that Subsection Eleventh of Section 152 of the Railway Labor Act is unconstitutional in that it violates individual freedom of association, the individual's right to work and constitutes taking of property without due process of law insofar as it requires involuntary contributions from the individual's compensation to labor unions. This decision is persuasive authority for Appellants' position.

Conclusion.

For the reasons set forth herein, Appellants respectfully pray that this Honorable Court reverse the judgment of the District Court denying a preliminary injunction and granting summary judgment and dismissal of the above-entitled cause.

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